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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OMAIMA NELSON,
Petitioner - Appellant,

- VS. -

GWENDOLYN MITCHELL,
Warden, et al.,

Respondent - Appellee.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit
U.S.C.A. No. 04-55124
U.S.D.C. No. CV-02-00615-CAS

PETITION FOR WRIT OF CERTIORARI

APPENDIX

VOLUME 2 of 2

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

* * * * * * * *

OMAIMA NELSON,

Petitioner,

vs.

GWENDOLYN MITCHELL, Warden, et al.,

Respondent,

PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE'S AMENDED REPORT AND RECOMMENDATION FILED ON OCTOBER 17, 2003.
and
SECOND SUPPLEMENTAL DECLARATION OF ROGER T. NUTTALL

Petitioner, OMAIMA NELSON, by and through her

counsel, ROGER T. NUTTALL, hereby submits objections to the Amended Report and Recommendation of the United States Magistrate Judge filed on October 17, 2003.

By way of history, On August 27, 2003, an original Report and Recommendation of the United States Magistrate Judge was filed with the Clerk of the Central District.

Thereafter, having been granted an extension of time within which to file objections, the Petitioner, through counsel, on October 10, 2003, filed objections to the original Report and Recommendation. Additionally, on October 10, 2003, the Supplemental Declaration of Dr. Miles Estner, as well as the Supplemental Declaration of Plaintiff's counsel, ROGER T. NUTTALL, were filed. Said objections to the original Report and Recommendation, together with the Supplemental Declarations, filed on October 10, 2003, are incorporated herein, and are attached hereto, collectively, as Exhibit "A."

Thereafter, on October 17, 2003, the Magistrate Judge's Amended Report and Recommendation was filed with the Clerk of the Central District.

On October 20, 2003, the said Amended Report and Recommendation was apparently entered on the Court's ICMS system. On October 24, 2003, the Amended Report and Recommendation was received in counsel's office, wherein counsel first became aware of the said Amended Report and Recommendation on the afternoon of Sunday, October 26, 2003.

On October 28, 2003, counsel prepared a Motion for Extension of Time to File Objections until Friday, November 7, 2003. Said request was granted by this Court by telephone notice on November 4, 2003.

Petitioner's objections relate to the proposed opinion by the Magistrate Judge that the instant Petition is "untimely and should be dismissed," and that,"Petitioner is not entitled to equitable tolling because she has not met her burden of showing that mental illness or other disability was the 'but for' and proximate cause of her untimeliness and that her mental illness rendered her and her counsel incapable of filing a habeas petition before the statute of limitations expired."

In this regard, and specifically with reference to the equitable tolling issue, the Petitioner, through counsel, does not consent to the proposed Findings of Fact or to the proposed Order.

In this case, as has been indicated earlier, the preparation of the Habeas Petition involved numerous and complex issues attendant to Petitioner's mental state and competency at the time of the incident giving rise to the criminal charges, as well as at the time of trial. These issues were, and are, of obvious significance, and as they were presented, counsel recognized their importance, as well as his inherent obligation to prepare and present a Habeas Petition which was sound and which incorporated all relevant materials, wherein all relevant issues would be fully and adequately addressed.

Categorically, it remains the position of counsel that the Petitioner's mental deficiencies and mental incompetency, which endured through the trial itself, and thereafter, made such preparation impossible for a time, and thereafter, extremely difficult. It is counsel's belief that the issues attendant to the proceedings as have been presented in the Habeas Petition are significant and meritorious indeed. For our purpose here, counsel

additionally maintains that the case for equitable tolling as related to the limitations period propounded under the Anti Terrorism Effective Death Penalty Act, have likewise been meritoriously addressed. In this latter regard, it is respectfully submitted that the Magistrate Judge's findings relative to the equitable tolling issue appear untenable under the circumstances. Certainly, such findings do not promote the interests of justice in a case as important as the instant one.

In short, counsel proposes that equitable tolling does apply in this case, under the facts and circumstances attendant to the case, and that this Court should be allowed to proceed to address the meritorious issues presented in the original Habeas petition.

A chronological summary may be helpful here. As the Magistrate has indicated, it was in late 1996 where the Petitioner began to become somewhat lucid, and where she was able to finally begin to communicate with counsel respecting issues attendant to the trial. She continued to become somewhat more lucid in this regard through 1997, and it was in early 1998 that counsel was able to realize (based in part upon communications with the Petitioner) that there existed significant issues attendant to unconsciousness, as well as insanity. It was during that time, in early 1998, that Dr. Miles Estner, a Forensic Psychiatrist, was retained to advise counsel as to these issues.

At the time that Habeas counsel and Dr. Estner first were able to visit the Petitioner at her custodial facility on May 13, 1998, the Petitioner was "psychotic paranoid" wherein she refused to be examined by Dr. Estner. Ultimately, the Petitioner did consent to visiting with Dr. Estner, and Dr. Estner was ultimately able to render an opinion. Dr. Estner last visited the

Petitioner on August 27, 1998.

Collaterally, it needs to be noted here that the Court has reminded counsel of statements made in previous filings, wherein the Court suggests that counsel is now "retreating" from earlier statements in terms of taking "inconsistent positions" within the Doctrine of "judicial estoppel." Counsel respectfully disagrees.

The Magistrate has pointed out that counsel believed that it was in late 1997 that the Petitioner's mental condition was such that she began to be able to assist in her defense. Obviously, this was, and has been, counsel's opinion, which must be recognized truly for what it actually is... an honest but lay observation by counsel, and not a definitive psychiatric or medical diagnosis.

The Magistrate also reminds counsel of counsel's assertion, from the records, opinions, etc., that Petitioner was incompetent to assist in her own defense, assist counsel in the preparation of the Petition for Writ of Habeas Corpus, much less understand and undertake the preparation of the a Petition of Writ of Habeas Corpus until Mid 1998, at the earliest.

Unfortunately, it was at that point that the Magistrate concludes, by way of severe "quantum leap," so to speak, that as a matter of fact, in Mid-1998, the Petitioner suddenly became fully competent. In other words, the Court erroneously attributes counsel's lay opinion to mean that as of Mid-1998, the Petitioner had indeed become fully competent wherein she was fully able to participate competently in the process. This is not what counsel said. That which counsel has said, and which has been re-affirmed in subsequent Declarations, is that it was at about that time when the Petitioner's previous incompetency began to resolve somewhat, wherein she could participate in a manner

which, for want of a better description, had the "semblance" of competency. Most important, counsel did not, as the Court suggests at Page 16, Line 22, state that the Petitioner was in fact sufficiently competent to assist counsel in the preparation of the petition. This conclusion on the part of the Court presupposed and assumed (without evidence) that remarkably, there came a certain day when the Petitioner suddenly became competent. Clearly, under the circumstances attendant to this case, not the least of which is Dr. Estner's expert opinion, as well as the lay observations of competent and respected counsel, this opinion by the Magistrate Judge runs contrary to common sense, logic and expert observation.

Further, the Magistrate Judge's assertion that the Court had "liberally construed as of July 1, 1998, that Petitioner was sufficiently mentally competent to assist in the preparation of the petition," manages to wholly ignore the expert opinion by Dr. Estner based upon his having visited with the Petitioner and having reviewed her records during relevant times that "it is highly unlikely that the Petitioner, during the years 1998 and 1999, based upon her incompetency, lacked the consistent ability to rationally assist Mr. Nuttall in the preparation of her Habeas Corpus Petition." Dr. Estner pointed out that during this particular period, the Petitioner was not being treated for her Post-Traumatic Stress Disorder, and her propensity for Dissociation, wherein Dr. Estner opined that this set of events "would predictably render her incommunicative regarding the topics necessary to the preparation of her Habeas Corpus Petition."

In this latter regard, and by way further lay observation on

the part of counsel herein, it is general knowledge that a Post-Traumatic Stress Disorder which essentially goes untreated is oftentimes manifested by persistent avoidance (by the patient) of thoughts, feelings or conversations associated with the cause of the stress disorder, wherein such persons persist in avoiding any recollections of the trauma, and wherein there oftentimes exists an actual inability to recall important aspects of the trauma.

In the final analysis, there exists no specific formula, as such, by which to determine whether the concept of equitable tolling should apply. Counsel would like to believe that his own assertions and those of his expert witness would be accepted by the Court without skepticism as representing the honest and true observations as recalled and reported. It is respectfully submitted, if indeed these factors and circumstances are given appropriate face value, that this Court should find that there did in fact exist extraordinary circumstances beyond the Petitioner's control which made it impossible for her counsel to properly and fully file the claims on time. The Court should further find that a substantial showing of mental incapacity has been documented supporting this position. Of course, in order to reach this decision, counsel recognizes that this Court may well be forced to discard its earlier suggestion that Petitioner's counsel was somehow wily and/or crafty in engaging in "nothing more than back peddling," as well as its suggestion that counsel perhaps did not appreciate the "dignity of these judicial proceedings." Perhaps most important in this regard, this Court would have to discard its clearly unwarranted finding that Dr. Miles Estner, a highly qualified forensic psychiatrist (See attached Curriculum Vitae, marked Exhibit "B"), has no credibility in terms of the

assertions which were made by him respecting his examination of the Petitioner at relevant times and as related to the timeliness of the preparation of the Habeas Petition.

In conclusion, the fact of the matter is that Petitioner has shown facts which comprise "extraordinary circumstances" under applicable case law. In this regard, it is felt that the Petitioner has met her burden in that her mental incapacity and disability rendered her, to a significant extent, incapable of being able to appropriately assist counsel in the filing of the Habeas petition at any time prior to the time that it was actually filed.

THEREFORE, it is respectfully urged that the Motion to Dismiss be denied, and that this Petition be viewed, under the facts and circumstances of the instant case, as having been timely filed. Clearly, the interests of justice, as well as the pursuit of justice in criminal proceedings, would be best served by allowing the instant Petition to proceed upon the most significant merits attendant thereto.

DATED: November 6, 2003.

Respectfully Submitted,
NUTTALL & COLEMAN

"s/ ROGER T. NUTTALL"
By: _____
ROGER T. NUTTALL
Attorneys for Defendant
OMAIMA NELSON

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ATTORNEYS FOR Petitioner
OMAIMA NELSON

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

* * * * * * * * *

OMAIMA NELSON,
Petitioner,

vs.

GWENDOLYN MITCHELL, Warden, et al.,
Respondent,

SUPPLEMENTAL DECLARATION OF ROGER T. NUTTALL

STATE OF CALIFORNIA)
COUNTY OF FRESNO) ss.

I, ROGER T. NUTTALL, declare that:

1. I am an attorney licensed to practice law in the State of California, and that I am the attorney of record for the Petitioner, OMAIMA NELSON, herein;

2. The instant Supplemental Declaration is intended to respond to conclusions made in the proposed Report and Recommendation of United States Magistrate Judge, VICTOR B. KENTON, dated August 27, 2003;

3. Reference in this regard is made to an earlier Declaration of ROGER T. NUTTALL dated September 21, 1999, said Declaration having been marked as Exhibit "A" to Petitioner's Response to the State of California's Motion to Dismiss filed with this Court on or about April 20, 2003;

4. As counsel for the Petitioner, your Declarant has always maintained that the Petitioner herein was incompetent to assist in her own defense and to assist counsel in any meaningful way in the preparation of the Petition for Writ of Habeas Corpus, much less understand and undertake the preparation for a Petition for Writ of Habeas Corpus, until at least Mid-1998, at the very earliest;

5. In the Honorable Magistrate Judge Kenton's proposed Report and Recommendation, at Page 16, Line 4, Dr. Miles Estner's professional opinion as to the Petitioner's mental state at the time of the offense is acknowledged; however, the court noted that Dr. Estner failed to render any opinion as to "whether Petitioner was, at any time following judgment, incapable of assisting habeas counsel in preparing the petition." Magistrate Judge Kenton goes further at Line 21, on Page 18, to suggest that "it is reasonable to conclude...that by July 1, 1998, at the latest, Petitioner was sufficiently competent to assist her counsel in the preparation of her habeas petition."

6. Upon receiving the proposed Report and Recommendation, counsel sought an extension of time within

which to file objections to the Magistrate Judge's Report and Recommendation. Said Motion was graciously granted until October 15, 2003;

7. For these purposes, notwithstanding the fact that Dr. Miles Estner's professional assistance was not originally sought for purposes attendant to the issue of "equitable tolling," your Declarant did, as counsel for the Petitioner, contact Dr. Estner to address this issue;

8. Dr. Estner has been able to recover his file; and based upon his understanding of the issues, he has addressed the issue of Petitioner's competency during the applicable time period prior to the original filing of the Petition for Writ of Habeas Corpus, wherein he has concluded that, in his professional opinion, the Petitioner was "trial-incompetent" during 1998, and foreseeably into 1999, in that she lacked the consistent ability to rationally assist counsel in preparing her case;

9. Dr. Estner has further stated that, in his professional opinion, the Petitioner was not able to rationally assist counsel during the interval of May to August of 1998, and that absent necessary treatment (which was not sought or given) it was likely that she remained incompetent into the year 1999;

10. Your Declarant, as counsel for the Petitioner, has also consistently maintained that it is, and has been, counsel's belief that even at the time of the filing of the Petition for Writ of Habeas Corpus, the Petitioner still exhibited significant signs of mental incompetency which interfered with the preparation of the Habeas Petition;

11. Indeed, your Declarant believes, to this date, that Petitioner's ability to continue to assist in her legal matters is

substantially hindered by such continuing mental difficulties;

12. Your Declarant can attest further to the fact that he has observed in his continuing dealings with the Petitioner that there has been no sudden or unexpected restoration of competency, even to this date;

13. In this latter regard, your Declarant cites to the Declaration of the Petitioner dated May 2, 1999, heretofore filed as Exhibit "B" to Petitioner's Response to the State of California's Motion to Dismiss, also filed in this Court on or about April 20, 2003, wherein Petitioner states that as of that date, she still did not feel that she understood what actually happened in terms of the facts of the case giving rise to the prosecution, and that as of that date, she still did not feel that she really understood what was going on in terms of the trial itself;

14. For these reasons, your Declarant believes that the extraordinary and truly equitable concept of "equitable tolling" should be afforded the Petitioner, in that her mental illness and/or incompetency directly and proximately contributed to the purported untimeliness wherein such disability rendered her counsel incapable of properly filing the Petition for Writ of Habeas Corpus prior to the expiration of the statute of limitations.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct except as to those matters stated upon information and belief, which I believe to be true, and that this Declaration was executed on October 13, 2003, at Fresno, California.

"S/ROGER T. NUTTALL"

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ATTORNEYS FOR Petitioner
OMAIMA NELSON

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
* * * * * * * * *

OMAIMA NELSON,
Petitioner,

vs.

GWENDOLYN MITCHELL, Warden, et al.,
Respondent,

SUPPLEMENTAL DECLARATION OF DR. MILES ESTNER

STATE OF CALIFORNIA,)
COUNTY OF FRESNO.) ss.

I, DR. MILES ESTNER, declare that:

1. I am a clinical psychiatrist licensed to practice medicine and surgery in the State of California; Board-Certified in Psychiatry, Forensic Psychiatry, and a Board-Certified Medical

Examiner;

2. Reference is herein made to my earlier Declaration dated August 20, 1999, which, I understand, was attached to a previous legal pleading filed by counsel for Petitioner, and which is attached hereto as Exhibit "A";

3. Recently, I was contacted by Attorney, ROGER T. NUTTALL, of the law offices of NUTTALL BERMAN ATTORNEYS of Fresno, California, wherein I was asked to review my file in an effort to form a professional opinion as to whether or not the petitioner (OMAIMA NELSON) was competent to assist counsel in the preparation of the Petition for Writ of Habeas Corpus subsequent to Mid-1998;

4. I have reviewed my file, and my recollection of this case; and in response to Mr. Nuttall's request, I wrote to him on October 6, 2003, wherein I rendered my professional opinion. A photocopy of the said October 6, 2003, letter is attached hereto and marked as Exhibit "B" and incorporated herein, in full, by reference;

5. In essence, in my professional opinion, it is highly likely that the Petitioner, during the years 1998 and 1999, based upon her incompetency, lacked the consistent ability to rationally assist Mr. Nuttall in the preparation of her Habeas Corpus Petition. In this regard, during the said period of time, absent necessary treatment which I understand was not given, she continued to suffer from post-traumatic stress disorder, with a propensity for Dissociation, which would predictably render her incommunicative regarding the topics necessary to the preparation of her Habeas Corpus Petition.

WHEREFORE, I declare, under penalty of perjury under

the laws of the State of California, that the foregoing Declaration, including my letter dated October 6, 2003, which is included in its entirety by reference, is true and correct in my professional opinion, and that this Declaration was executed on October 11, 2003.

"s/MILES ESTNER"

EXHIBIT A

DECLARATION OF DR .MILES ESTNER

STATE OF CALIFORNIA,)
COUNTY OF FRESNO.) ss.

I, DR. MILES ESTNER, declare that:

1. I am a clinical psychiatrist licensed to practice Medicine and Surgery in the State of California; Board-Certified in Psychiatry, Forensic Psychiatry, and a Board-Certified Medical Examiner;

2. I was first contacted by Roger T. Nuttall on or around March 24, 1998 for, the purposes of examining Petitioner Omaima Nelson and giving him my professional opinion as to her mental and physical health. I was retained by Nuttall Berman Attorneys formally for these purposes on March 30, 1998;

3. I was provided with access to all pertinent records and materials possessed by Nuttall Berman Attorneys regarding this case at the time that I was retained;

4. In my professional opinion, Petitioner Omaima Nelson suffers from a Dissociative Disorder or a form of Post-Traumatic Stress Disorder of which Dissociation is a cardinal symptom. This results from her lifetime of abuse, beginning with sexual molestation as a young child, followed by ritual female circumcision without anesthesia, compound by additional sexual molestation and abuse in her native Egypt and in America, and culminating in physical, emotional, and additional sexual abuse by William Nelson, her husband at the time of the incident;

5. Petitioner Omaima Nelson did psychotically dissociate as a result of William Nelson's continuous abuse of her in their

home following a trip to Arkansas which was marked by substantial verbal, physical, and sexual abuse. The psychosis involved a grossly altered perception of reality with an altered level of consciousness. The Dissociation was a departure from reality and was accompanied by altered levels of consciousness, such as is seen in hypnotic states or with the use of Phencyclidine, a clinical anesthetic, also known as a dissociative agent. Further substantiation of Petitioner's level of unconsciousness at the time of the incident are the bizarre ritual-like acts which she performed on her husband's body following his killing which were carried out over a period of several days;

6. I, accompanied by Roger Nuttall, first visited Petitioner Omaima Nelson on May 13, 1998. At that time she appeared to be psychotically paranoid and refused to be examined by me;

7. I next saw Petitioner on May 21, 1998. I was able to examine her at that time. However, despite having, given releases to the proper facility officials and having received assurances to the contrary, I was denied access to her prison medical records;

8. Petitioner Omaima Nelson's prison medical records are essential to a proper diagnosis of her both mentally and physically;

9. I next saw Petitioner and examined her for a second time on August 27, 1998 at Valley State Prison and was finally given the additional medical records;

10. It is my professional opinion, to best medical and scientific certainty, that Omaima Nelson was, at the time of the offense, clinically unconsciousness due to her dissociation;

11. It is also my opinion, to best medical and scientific certainty, that Omaima Nelson was, at the time of the offense, as a result of her mental illness, not able to know or understand the

nature and quality of her acts; nor was she capable of distinguishing right from wrong in her psychotic, dissociated state;

12. Having examined Ms. Nelson and reviewed the transcript of her testimony, as well as reviewed contemporaneous medical and psychiatric records from the jail, I also opinion that Ms. Nelson, as a result of her mental illness, could not understand the nature and purpose of the legal proceedings being taken against her; nor was she able to cooperate rationally with defense counsel in preparation and presenting her defense, e.g. close to the trial date she was observed smearing her own face with red jello, insisting that it was a facial treatment.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this. Declaration was executed on August 20, 1999, at Fresno, California.

"s/Dr. Miles Estner"
Dr. Miles Estner

EXHIBIT B

S. MILES ESTNER, M.D.
FORENSIC MEDICINE & PSYCHIATRY

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October 6, 2003

Mr. Roger T. Nuttall
Attorney at Law
Nuttall, Berman, & Associates
2333 Merced Street
Fresno, CA 93721

RE: Case No. SA CV 02-00615-CAS (VBK)
NELSON, O. v. Warden Mitchell
Writ of Habeas Corpus
Forensic Consultation

Dear Mr. Nuttall,

This document is respectfully submitted following your request that I analyze Ms. Nelson's mental competency to assist Counsel during these proceedings.

IDENTIFICATION: Ms. Nelson, originally at Chowchilla State Prison, is now incarcerated at the Valley State Prison, Chowchilla, California, serving a 25 year sentence for Second Degree Murder. I examined her at the Prisons on May 13, 1998, May 21, 1998, and August 27, 1998. The results of my

evaluations of her as well as extensive document review led to several conclusions, including that she was incompetent to stand trial during her original proceedings in Orange County. Now comes the question of her trial competency around the time of these examinations.

OPINION: In my professional opinion, Ms. Omaima Nelson WAS Trial-Incompetent during 1998, and foreseeably into 1999. She specifically lacked the consistent ability to rationally assist Counsel in preparing her case. I hold this opinion for the following reasons.

Ms. Nelson, on the opinion of several examining doctors, including myself, suffers from Post-Traumatic Stress Disorder, with a propensity for Dissociation.

She qualifies for the diagnosis by having been through extreme experiences that would expectedly leave one traumatized.

Ms. Nelson has manifested required symptoms of dissociation, hypervigiliance, re-experiencing phenomena, and most pertinently, avoidance of situations which necessitate dealing with those events.

Predictably, due to her diagnosis, Ms. Nelson would manifest difficulty and even inability to discuss details of her past as a manifestation of avoidance.

Her difficulties in this area were manifested during my interviews of her been May and August of 1998.

At the first interview of May 13, 1998, Ms. Nelson was able to participate in the examination at all.

Subsequent interviews of May 21, 1998, and August 27,

1998, were more productive, but the content of those interviews contained substantial avoidance of sensitive areas, with a strong tendency on Ms. Nelson's part to keep the topics on current developments, rather than details of past experience.

She also manifested an avoidance of psychiatric treatment in Prison, treatment which could help resolve her symptoms and allow for freer flow of information pertinent to her Writ.

As a psychiatrist with training and experience in facilitating rapport and information exchange with traumatized or paranoid patients, given the challenges I experienced in helping Ms. Nelson share her past, I extrapolate to Counsel's having serious similar. difficulties, indicating Ms. Nelson's inability to rationally assist Counsel in her proceedings.

SUMMARY: In my professional opinion Ms. Omaima Nelson WAS NOT able to rationally assist Counsel during the interval of May-August, 1998. Absent necessary treatment, it is likely that she remained incompetent into the year 1999.

It remains my opinion that Omaima Nelson was Incompetent to Stand Trial during her original proceedings.

She continued to suffer from a mental condition, Post-Traumatic Stress Disorder, which would predictably render her incommunicative regarding topics necessary to her Petition.

Specifically, avoidance of sensitive areas was clearly manifested in:

Inability to participate in the first interview;
Avoidance of and inability to discuss sensitive areas during subsequent interviews, and;

Resistance to psychiatric treatment available to her which

might reduce her symptoms and ease sharing of pertinent information.

Thank you for having requested my opinion :in this matter. I hope that these efforts are helpful to the Court in its deliberations.

Sincerely

"s/S. Miles Estner, M.D."
S. Miles. Estner, M.D.

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Court Appointed Examiner, San Luis Obispo, Santa Barbara, Fresno, Kings County
Court-Appointed Examiner, Sacramento, Nevada, Placer, Solano County
Private Practice, Clinical and Forensic Psychiatry

Psychiatric Training

University of California, San Francisco
Fellowship in Forensic Psychiatry, 1993 - 1994
Recipient, U.C.S.P. Medical Research Award, 1994
University of California, San Diego
Residency in General Psychiatry, 1990 - 1993
Jonas Rappeport Fellow in Psychiatry and the Law, 1992 - 1993

Licensing and Certification

Diplomate, American Board of Psychiatry and Neurology, Added Qualifications in Forensic Psychiatry
Diplomate and Fellow, American College of Forensic Examiners
Diplomate, American College of Forensic Medicine
Diplomate, National Board of Medical Examiners
Licensed Physician & Surgeon, Medical Board of California, Illinois, Washington, Oregon

Medical Education and Training

University of Pittsburgh School of Medicine, M.D.. 1984
Addison H. Gibson Foundation Scholar, 1982 - 1984
National Institutes of Health, Bethesda, Maryland,
Fall Quarter, 1983
The Royal Infirmary of Edinburgh, Edinburgh, Scotland,
Winter , 1984
The Cleveland Clinic, Cleveland, Ohio, Spring Quarter, 1984
Albert Einstein College of Medicine/Moutefiore Medical
Center, New York, New York
Internship, Residency. and Chief Residency in Medicine and
Surgery, 1984-1989

Undergraduate Education

Haverford College, Philadelphia, Pa, B.A. with Honors, 1980
Magill-Rhoads Scholar, 1976 - 1980
Christian and Mary F. Lindback Foundation Scholar, 1978 -
1980

References

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8) Estner, S. Miles, M.D., "Freud's Forensic Opinion in the Halsmann Case," presented at the Annual Meeting of the American Academy of Psychiatry and the Law, San Antonio, Texas, 1993

9) Estner, S. Miles, M.D., "Prediction of Dangerousness," presented at Grand Rounds, U.C.S.F. Department of Psychiatry, Graduate Medical Education Program, Seminars in Forensic Psychiatry, Atascadero, Ca., October, 1993

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17) Estner, S. Miles. M.D., Instructor, Introductory Seminar Series in Psychiatry and the Law, U.C.S.F. School of Medicine, Fresno-Central San Joaquin Valley Medical Education Program

Department of Psychiatry, January - April, 1995

a) Psychiatry and the Law: Forensic Psychiatry
b) Privilege and Confidentiality
c) Right to Treatment: Right to Refuse Treatment
d) Negligence and Medical Malpractice
e) Tarasoft I. and II.: The Duty to Warn Becomes a Duty to Protect
f) Competency to Stand Trial
g) Legal Insanity
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18) Estner. S. Miles, M.D., "Begin at the Beginning: Fellowship Training in Forensic Psychiatry," Newsletter, American Academy of Psychiatry and the Law, April, 1995

19) Estner, S. Miles. M.D., "The Importance of Mentors," Newsletter, American Academy of Psychiatry and the Law, August, 1995

20) Estner, S. Miles, M.D., "The Use and Abuse of Psychiatric Experts," presented at MCLE Conferences, Kern County, September (District Attorneys), October (Public Defenders), 1995

21) Estner, S. Miles, M.D., "Testamentary-Capacity," presented at Grand Rounds, U.C.S.F. School of Medicine, Department of Psychiatry, Graduate Medical Education Program, Seminar Series in Forensic Psychiatry, Atascadero, CA, October, 1995

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24) Estner, S. Miles, M.D. "Malingering (and Mental Illness?)," presented at MCLE Conference Office of the District Attorney, Kern County, December, 1995

25) Ibid, 23), presented at MCLE Conference, Office of the Public Defender, Fresno County, December, 1995

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27) Ibid, 24) at MCLE Conference, Office of the District Attorney, Fresno County, January, 1996

28) Estner, S. Miles, M.D. Instructor, Introductory Seminar Series in Psychiatry and the Law, U.C.S.F. School of Medicine, Fresno-Central San Joaquin Valley Medical Education Program, Department of Psychiatry, January 5 26. 1996

a) Psychiatry and the Law: Forensic Psychiatry
b) Privilege and Confidentiality, including Tarasoft Issues
c) Negligence and Medical Malpractice
d) Competency to Stand Trial
e) Legal Insanity

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a) The Psychiatric Assessment of Risk and Dangerousness
b) The Clinical Detection of Malingering
c) Advanced Issues in Civil Forensic Psychiatry: Emotional Injury, Child Custody

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Education Committee of the American Academy of Psychiatry and the Law at its Annual Meeting, San Juan, Puerto Rico, October, 1996

37) Estner, S. Miles, M.D., "Working With (& Against) Psychiatric Experts," presented to the California Public Defender's Association, Monterey, CA, November, 1996

38) Estner, S. Miles, M.D., "The Private Practice of Forensic Psychiatry," presented at Grand Rounds, UCSF School of Medicine, Graduate Medical Education Program, Seminars in Forensic Psychiatry, Atascadero, CA, March, 1997

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44) Estner, S. Miles, M.D., "Coping with Subpoenaed

Records, and Special Confidentiality Issues; Evaluating Minors for the Courts; Medicolegal Consultations in a Hospital Setting," UCSF School of Medicine, San Joaquin Valley Medical Education Program, February 20, 1998

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48) Estner, S. Miles, M.D., "From McNaughten to Bazelon and Back," UCSF School of Medicine, San Joaquin Valley Medical Education Program, February 5, 1999

49) Estner, S. Miles, M.D., "Competency to Give Sworn Testimony," UCSF School of Medicine, San Joaquin Valley Medical Education Program, February 19, 1999

50) Estner, S. Miles, M.D., "Sexual Harassment: Wrongful Termination," UCSF School of Medicine, San Joaquin Valley Medical Education Program, February 26, 1999

51) Estner, S. Miles, M.D., "Mock Trial: Direct and Cross-Examination of Expert Witness," Northern Santa Barbara County Chapter of the California Bar Association, March 27, 1999

52) People v. Robinson, Henry, 84 Cal Rptr 2d 832, 72 Cal App 4th 421, 1999

53) Estner, S. Miles, M.D., "Working With and Against Psychiatric Experts" presented to the Kings County Bar Association, Hanford, CA, September 16, 1999

54) Mock Trial, "Reliability of Eyewitness Identification; Recording and Recall of Memories, I." Office of the Public Defender, Fresno County, Fresno, CA, ½712000

55) Mock Trial, "Reliability of Eyewitness Identification, II" Office of the Public Defender, Fresno County, Fresno, CA, 3/17/ 2000

56) Estner, S. Miles, M.D., "Direct and Cross Examination of Psychiatric and Psychological Experts", California State Department of Justice, Office of the Attorney General, Sacramento, CA, March 21, 2000

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

* * * * * * * * *

OMAIMA NELSON,
Petitioner,

vs.

GWENDOLYN MITCHELL, Warden, et al.,
Respondent,

PETITIONER'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION FILED AUGUST 27, 2003.

Dated October 13, 2003

Petitioner, OMAIMA NELSON, by and through her counsel of record, ROGER T. NUTTALL, hereby submits objections to the Report and Recommendation of the United States Magistrate Judge filed on August 27, 2003.

On September 15, 2003, Petitioner, through counsel, moved for an extension of time within which to file objections to the Magistrate Judge's Report and Recommendation.

On September 22, 2003, an order was filed graciously allowing counsel for the Petitioner 30 days from September 15, 2003, until October 15, 2003, to file such objections.

Petitioner's objections respectfully relate to the opinion by the Magistrate Judge that the "Petitioner is not entitled to equitable tolling because she has not met her burden of showing that mental illness or other disability was the 'but for' and proximate cause of her untimeliness and that her mental illness rendered her and her counsel incapable of filing a habeas petition before the statute of limitations expired."

In this regard, as indicated fully in earlier pleadings, the instant case, in terms of the preparation of the habeas petition, involved numerous and complex issues attendant to the Petitioner's mental state and competency at the time of the incident giving rise to the charges, and at the time of trial. Of course, given these circumstances, counsel wished to and was obligated to prepare a habeas petition that was sound and which incorporated all relevant materials and which fully addressed all issues. The fact of the matter is that the Petitioner's mental deficiencies and mental incompetency which has endured since the trial itself, made such preparation impossible for a time, and thereafter, difficult, at best.

In this regard further, the Magistrate Judge has concluded at Page 18, at Line 21, that "it is reasonable to conclude, therefore, that by July 1, 1998, at the latest, Petitioner was sufficiently competent to assist her counsel in the preparation of her habeas petition." Respectfully, Petitioner's counsel objects to that

finding, while recognizing that the record, as it has stood heretofore, may well have allowed the Magistrate Judge to make such an assumption.

In this specific latter regard, attached hereto is the Supplemental Declaration of counsel wherein counsel maintains that even at the time of the filing of the Petition for Writ of Habeas Corpus, Petitioner still exhibited signs of mental incompetency which significantly interfered with the preparation of the petition. Counsel, in his Declaration, also goes on to assert that the extraordinary and equitable concept of "equitable tolling" should be afforded the Petitioner in this instance since her mental illness and/or mental incompetency directly and proximately contributed to the purported untimeliness, wherein such disability rendered counsel incapable of properly filing the petition prior to the date when it was actually filed on September 21, 1999.

Further, reference is made to the Supplemental Declaration of Dr. Miles Estner which is attached hereto and wherein Dr. Estner, in his professional opinion, states that it is highly likely that the Petitioner in this case, during the years 1998 and 1999, based upon her mental incompetency, lacked the consistent ability to rationally assist counsel in the preparation of the habeas petition. Indeed, Dr. Estner, under penalty of perjury, notes Petitioner as having suffered from post-traumatic stress disorder with dissociation, which would predictably render her incommunicative, during this period of time, regarding the topics necessary to the full and complete preparation of the petition.

It is respectfully asserted that the Doctrine of Equitable Tolling as related to the AEDPA limitation period should be afforded Petitioner herein based upon a demonstration that "extraordinary

circumstances" exist which justify such tolling. See Calderon v. United States District Court (Kelly) 163 F.3d 530 (9th Cir. 1998).

Indeed, the equitable tolling relates to mental difficulties which easily comprise "extraordinary circumstances" which were beyond the Petitioner's control which made it impossible to properly file the petition at any time sooner than it was actually filed. See Calderon v. United States District Court (Beeler) 128 F.3d 1283 (9th Cir. 1997).

In conclusion, it respectfully submitted that Petitioner herein has now met her burden in that her mental incapacity and disability rendered her incapable of being able to assist counsel in filing the habeas petition at any time prior to the time when it was actually filed. Therefore, it is respectfully submitted that the Motion to Dismiss be denied, and that the Petition be viewed, under the facts and circumstances of the instant case, as timely pursuant to the Doctrine of Equitable Tolling as related to the limitations period propounded under the Anti-Terrorism Effective Death Penalty Act.

DATED: October 13, 2003.

Respectfully Submitted,
NUTTALL BERMAN ATTORNEYS
"s/ROGER T. NUTTALL"
By: _____
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ATTORNEYS FOR Petitioner
OMAIMA NELSON

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

* * * * * * * *

OMAIMA NELSON,
Petitioner,

vs.

GWENDOLYN MITCHELL, Warden, et al.,
Respondent,

PETITIONER, OMAIMA NELSON'S RESPONSE TO THE STATE OF CALIFORNIA'S MOTION TO DISMISS THE WRIT OF HABEAS CORPUS

Filed April 21, 2003

Petitioner, Omaima Nelson, herein responds to the State of California's Motion To Dismiss the Writ of Habeas Corpus as time-barred.

Petitioner contends that the Petition is timely filed pursuant to 28 U.S.C. § 2244(d)(2). Petitioner further contends that extraordinary circumstances, as set forth in the original habeas corpus filing in the Central District Court, as well as those issues addressed in previous State of California habeas filings, constitute adequate justification for tolling of the AEDPA.

BACKGROUND

Herein, the Petitioner sets forth a chronology of specific dates and activities, supported by the Declaration of Roger T. Nuttall, attorney for the Petitioner (Exhibit A); Omaima Nelson, Petitioner, (Exhibit B); Miles D. Estner, MD., consulting physician, (Exhibit C); and Nancy Kaser-Boyd, PhD., noted author, and recognized mental health expert in the filed of "battered women syndrome", (Exhibit D).

Nelson was charged on April 21, 1992. The trial began on December 2, 1992, and the jury returned its verdict on January 12, 1993. Sentencing occurred on March 12, 1993, following a denial of a motion for a new trial. Petitioner then obtained appointed appellate counsel shortly thereafter. Petitioner never met with appellate counsel and only spoke with him over the telephone on two or three occasions. Hence, Petitioner had a minimal participation in the appellate process and was never informed by appellate counsel that she could file a Writ of Habeas Corpus concurrently with any of her appeals. Moreover, she had no reason to know of such a possibility due to her minimal education, lack of legal knowledge, and chiefly her psychotic mental condition. (Exhibit C [Declaration of Dr. Miles Estner, pages 1-4]; see also Exhibit B [Declaration of Omaima Nelson, page 1].) Appellate counsel filed an appeal with the Court of Appeal of the 4th District on March 1, 1994. The Appellate Court released its opinion on February 28, 1995. Thereafter, an appeal

was filed with the California Supreme Court on April 6, 1995, which was followed by that Court's denial of certiorari on May 31, 1995. Following the denial of certiorari, Petitioner obtained present habeas counsel on August 5, 1995.

For the remainder of the year 1995, present habeas counsel for Petitioner, together with a member of said counsel's support staff, reviewed the transcripts of the trial, which were lengthy, as well as the appellate briefs and other materials relative to the appeal of this case. Present counsel began the process of reviewing the case file, performing background legal research, meeting with Petitioner, and attempting to gather all pertinent records.

Initially, present counsel for Petitioner began researching the remedies of Coram Nobis and Habeas Corpus. Counsel also began researching certain aspects of the law as related to problems peculiarly related to Petitioner, e.g. sexual mutilation as it related to her having been sexually mutilated as a child in Egypt and her subsequent physical and sexual abuse at the hands of her late husband.

Several interviews were completed with Petitioner during the latter part of 1995. These interviews were difficult due to Petitioner's particularly disorganized mental state and counsel's difficulty dealing with Petitioner on a personal communication level. Because of Petitioner's inability to fully cooperate or communicate with present counsel due to her then-existing level of psychosis, counsel had further problems trying to elicit facts from Petitioner with regard to the case and trial.

Throughout this time period, counsel's office was actively trying to obtain mental health records from Orange County, as well as hospital records dealing with Petitioner's mental state. However,

counsel's initial efforts were somewhat stymied by inaction on the part of the agencies possessing the pertinent records.

The review of the documentation that had thus far been received continued into the early part of 1996, and it was at that time that counsel began legal research regarding the issues that had been raised on appeal. Meanwhile, counsel continued to talk to experts concerning the genital and sexual mutilation issues, as well as review the medical records which had thus far been obtained. Counsel further examined the appellate issues through a review of the trial transcripts and continued to seek records from the Orange County Superior Court. Counsel's office did receive additional records from the Orange County Superior Court in late February, 1996.

At that time, present counsel began to examine pretrial matters such as pretrial motions and matters attendant to that. Counsel initially focused on the idea of re-litigating all of the issues related to the possible plea of not guilty by reason of insanity, which, it was felt, should have been asserted in this case. Counsel further examined the issue of the insanity plea in relation to a Petition for a Writ of Habeas Corpus. All the while, present counsel continued to visit periodically with Petitioner to see if her mental state had improved enough to a point where she could be able to relate her recollection of the circumstances of the case and/or her recollection of the trial.

While present counsel felt that Petitioner was getting better during early 1996, there were certain difficulties still present that were simply unable to overcome in terms of being able to communicate with Petitioner.

By the Summer of 1996, present counsel had discerned what issues needed to be developed; namely, the insanity issue, the delay of the jury deliberations, as well as the competency of counsel issues.

Pursuant to this end, counsel's office telephoned Mr. Thomas Mooney at the Public Defender's office in Orange County to obtain his file. Counsel was, at that time, particularly interested in what type of medical and psychiatric records Mr. Mooney had in his possession.

In October of 1996, counsel traveled to Orange County to meet with Mr. Mooney and to consult with him, as well as to meet and consult with Dr. Nancy Kaser-Boyd, in order to ascertain her thoughts on the mental issues involved in this case. Present counsel also met with Dr. Teresa Farjalla who had been a treating doctor while Petitioner was in custody, awaiting and during trial.

During present counsel's meeting with Mr. Mooney, it was requested that Mr. Mooney immediately forward the psychiatric and medical records. He represented that he would send all pertinent records regarding Petitioner such that present habeas counsel relied on those assurances.

In a subsequent meeting with Petitioner, counsel was able to gather enough information from Petitioner so as to be able to contrast what Petitioner was able to remember, and not remember, with the trial transcript. This, coupled with present counsel's discussions with Dr. Kaser-Boyd, convinced counsel that the biggest issue in the case was the failure to assert the insanity defense. At that time, counsel also wondered whether an unconsciousness defense had been asserted, that particular aspect was not then pursued further.

That same month, in October 1996, present counsel's office wrote again to Mr. Mooney requesting Petitioner's medical and psychiatric records, as well as any support respecting the waiver of the insanity defense. Present counsel also began to re-examine the transcript in light of the issues that counsel had developed at that time.

Additionally, counsel began speaking with the appellate attorney concerning certain appellate materials, and inquiring as to what other issues he thought may be available.

In December of 1996, counsel's office again wrote to Mr. Mooney specifically reminding him, for the second time, that Petitioner's medical, psychological, and psychiatric reports, were needed together with any records respecting her waiver of the insanity defense. As of this time, trial counsel had not sent any of the requested records.

At approximately this same time, late 1996, Petitioner started to became more lucid; and during meetings with her, present counsel and the Petitioner were able to talk somewhat more about her recollection of whether or not she waived the insanity defense and what she remembered of the circumstances of that waiver.

It became clearer and clearer to counsel that Petitioner was, during the trial of her case, effectively "excluded" from what was transpiring in the most important matters of the trial, and that matters were being handled on her behalf, without her approval and in her absence, or both.

During the early part of 1997, counsel continued to work on the preparation of the Petition for Writ of Habeas Corpus, but by May of 1997, counsel's office still had not received the medical, psychological, or psychiatric records and reports which had been requested, nor had the information relative to the purported waiver of the insanity defense been received. On May 29, 1997, counsel's office again requested the records from trial counsel.

In July of 1997, present counsel's office did finally receive those materials, and thereafter, a review of those records was commenced.

Following a review of those materials, counsel discovered that

there were additional failures on the part of trial counsel to pursue two very important issues; namely, the issue of the unconsciousness defense and the issue of Petitioner's incompetency to stand trial. Through further review, present counsel also discovered that the unconsciousness jury instruction had apparently been withdrawn by Mr. Mooney during the trial. Counsel then began researching the law regarding unconsciousness and came to believe that such was indeed a very appropriate issue based upon the facts of the trial as derived from the trial transcripts. Also, in approximately September, 1997, based upon what present counsel was learning from Petitioner from discussions with her, (she was starting to become much more lucid), present counsel then began considering the fact that Petitioner had most likely also been incompetent to stand trial at the time of trial and had really not known what was occurring around her at that time.

Subsequently, counsel again flew to Los Angeles and on September 19, 1997, met with Dr. Nancy Kaser-Boyd, wherein, they discussed both the insanity and unconsciousness defenses. Dr. Kaser-Boyd affirmed that both issues did, in her opinion, constitute viable defenses, which in her opinion, should have been asserted.

In October of 1997, counsel sent to Dr. Kaser-Boyd relevant reports and again pursued the purported waiver of the insanity defense by writing a fifth letter to Mr. Mooney requesting such waiver, as well as any other materials that he had concerning evaluations of Petitioner by Dr. Nancy Kaser-Boyd from the time of the trial.

Thereafter, counsel's office received what may have been the purported waiver of Petitioner's insanity defense, which was, in fact, merely a waiver of her right to be present.

At that same time, present counsel came to the realization that the

truly most significant issue in the case was the issue of unconsciousness, in addition to the insanity issue, and at that approximate time significant work on the issue of unconsciousness was commenced. Present habeas counsel, at this time, wanted to obtain additional expert support. Towards this end, in early 1998, counsel was able to locate Dr. Miles Estner, a medical doctor and a forensic psychiatrist. Dr. Estner was formally retained on March 24, 1998, to review the entire case including all of the records in order to advise counsel on the viability of the unconsciousness and insanity defenses. (Exhibit C, [Declaration of Dr. Miles Estner], pages 1-4].)

Continuing in 1998, Dr. Estner proceeded to review all of the records that present counsel's office had by then acquired. Dr. Estner that he needed to see Petitioner's prison medical file, as well as visit her in prison. On April 1, 1998, present habeas counsel sent a letter along with two letters of authorization to Petitioner which gave authorization for counsel and Dr. Estner to visit Petitioner at the Chowchilla Women's Facility where Petitioner was then confined. Petitioner received these letters of authorization and subsequently signed them on April 7, 1998. These signed letters of authorization were faxed by counsel's office to the appropriate contact at the Chowchilla Women's Facility on April 15, 1998. A meeting was then set up through the same contact at the Chowchilla Women's Facility for May 13, 1998. At the request of this contact at the Prison, additional background information was furnished by Dr. Estner on May 11, 1998, for the purpose of obtaining visitation privileges.

Present counsel along with Dr. Estner visited Petitioner on May 13, 1998. Petitioner at this time appeared to be psychotically paranoid and refused to be examined by Dr. Estner. The next examination by Dr. Estner occurred on May 21, 1998. Petitioner

cooperated fully with Dr. Estner at this time. However, despite having given releases to the proper facility officials and the officials' promises to the contrary, Dr. Estner was denied access to Petitioner's records as possessed by the facility's medical staff. These records were essential to Dr. Estner's determination of Petitioner's mental health as it related to Petitioner's heart condition and physical health in general. Present counsel attempted to have Dr. Estner visit Petitioner in early July but, due to administrative difficulties on the part of the facility, was only able to schedule a follow-up interview for July 16, 1998.

However, on that date, July 16, 1998, Petitioner had been transferred to another prison, Valley State Prison also in Chowchilla, California, with no reason given for the transfer. On July 20, 1998, pursuant to the new facility's administrative requests, present counsel's office faxed a request for permission for Dr. Estner to examine Petitioner at the Valley State facility. Counsel also had to send information to the new facility, despite having sent the same information to the former facility, in order to allow for visits between present habeas counsel and Petitioner. Having received no response to the request, present counsel again faxed a request on August 19, 1998, for permission for Dr. Estner to examine Petitioner. Thereafter, an appointment was arranged for Dr. Estner to examine Petitioner on August 27, 1998. Dr. Estner then examined Petitioner for the second time on August 27, 1998, at Valley State Prison and was finally given Petitioner's additional medical records. Dr. Estner then submitted his findings to present habeas counsel on October 5, 1998.

Dr. Estner ultimately came to the conclusion during the mid-part of the year 1998 that, more important than the failure to assert the

insanity defense, was the failure to assert the unconsciousness defense since it was particularly viable. Dr. Estner also concluded that, perhaps equally as important as the unconsciousness defense, was the failure to request on the part of trial counsel, and the failure to conduct on the part of the court, a Penal Code Section 1368 competency hearing. In Dr. Estner's opinion, Petitioner was both mentally and physically incompetent to stand trial.

Since the latter part of 1998, present habeas counsel's office had been trying to perfect the entire Petition for Writ of Habeas Corpus as regards state court proceedings. This process has included a review of the entire case file and a thorough examination of all possible relevant legal issues in order that the Petition be ultimately complete and adequate. In this regard, present counsel has explored additional issues, including, but not limited to, cultural defenses, the possible error with reference to not providing Petitioner with a court certified interpreter, but these, among other issues, which have been considered, have been discarded.

Approximately during middle to late 1998, based upon a review of the complete case, as well as a review of Dr. Estner's analysis, present counsel concluded that the most viable aspects of the case dealt with Petitioner's unconsciousness defense, as well as the serious question of her competency to stand trial, and that counsel has since directed his efforts assiduously toward those issues.

Petitioner previously applied for a Writ of Habeas Corpus to the Orange County Superior Court on September 21, 1999. This Petition was denied on October 20, 1999, by the Honorable Kazuharu Makino.

In the two-page Minute Order of October 20, 1999, summarily denying the Petitioner's request for habeas relief, the Superior Court

grouped Petitioner's Nine (9) specific issues into two (2) basic categories: (l) judicial error, and (2) ineffective assistance of counsel. The Court then briefly noted that several of the allegations of judicial error could have been raised on appeal, but were not; and then simply chose not to address these very serious judicial error issues raised by the Petitioner in the habeas brief. These judicial errors, as enumerated again in this petition, and thereupon expanded, are serious Constitutional

violations, and the Petitioner is seeking habeas relief in this forum.

The Petitioner also raised the issue of the "underwhelming" performance of counsel, and not only showed that the assistance provided was ineffective, but clearly demonstrated that counsel allowed the trial to be reduced to a farce and/or a sham. The Court, in its Minute Order, indicated that the Petitioner failed to plead facts which showed that the performance fell below the required objective standard. The Petitioner again raises the issue of ineffective assistance of counsel in this original petition, and pleads specific facts as to the ineffective assistance. The prejudice caused by this ineffective assistance clearly, in and of itself, invites reversal.

On March 8, 2000, Petitioner submitted an original Petition to the Court of Appeals, Fourth Appellate District, Division Three. This original Petition, in addition to re-iterating several of the same issues raised in the Petition to the Superior Court, raised three additional issues: reversible error by failing to instruct the jury on evidence of mental disease as to the ability to form specific intent; reversible error by failing to hold a Penal Code §1368 competency hearing in light of the substantial evidence presented that the defendant was suffering from psychosis; and, inadequate instructions on the defense of the battered woman's syndrome which prejudiced the defendant.

In an unpublished opinion, filed on August 31, 2000, the Appellate Court granted, in minor part, the Petition for a Writ of Habeas Corpus, ordering that the Penal Code §12022.1 two-year enhancement be vacated. In a ruling, astounding for its brevity, given the breadth and depth of the issues raised in the petition, the Appellate Court simply stated "[I]n her recently filed Petition for a Writ of Habeas Corpus, Nelson raised numerous issues, only one of which we found might have merit". This ruling fails to address any of the other issues raised in the petition.

The Petitioner also raised the issue of the "underwhelming" performance of counsel, and not only showed that the assistance provided was ineffective, but clearly demonstrated that counsel allowed the trial to be reduced to a farce and/or a sham. The Court, in its Minute Order, indicated that the Petitioner failed to plead facts which showed that the performance fell below the required objective standard. The Petitioner again raises the issue of ineffective assistance of counsel in this original petition, and pleads specific facts as to the ineffective assistance. The prejudice caused by this ineffective assistance clearly, in and of itself, invites reversal.

In an unpublished opinion, filed on August 31, 2000, the Appellate Court granted, in minor part, the Petition for a Writ of Habeas Corpus, ordering that the Penal Code §12022.1 two-year enhancement be vacated. In a ruling, astounding for its brevity, given the breadth and depth of the issues raised in the petition, the Appellate Court simply stated "[I]n her recently filed petition for a writ of habeas corpus, Nelson raised numerous issues, only one of which we found might have merit". This ruling fails to address any of the other issues raised in the petition.

On November 2001, Petitioner presented to the Supreme Court

of the State of California, an original Petition for a Writ of Habeas Corpus. This Petition was denied.

ARGUMENT

During the pendency of state collateral proceedings, the Petitioner had the burden of explaining the delay in filing the Writ of Habeas Corpus to the state courts's satisfaction. Petitioner, in state court proceedings argued that there were two cases dealing with using mental health as a defense on a collateral attack that define the limits of a satisfactory delay in such a circumstance.

The California Supreme Court, in *In re Saunders* (1970) 2 Cal. 3d 1033 [472 P.2d 921], held that a 5-year delay in seeking collateral relief was sufficiently explained where the defendant contended that his trial counsel had been ineffective in failing to raise the defense of diminished capacity and the defendant alleged that (**a**) he had only a 9th grade education and was without experience or education in law; (**b**) that there was a 4-year delay between the time that the defendant learned that his trial counsel had received medical records prior to or during the trial and the time of the collateral filing; (**c**) that even after he learned of that information he was unable to make use of it because he did not have access to his complete medical records and because he was unaware of the applicable law; (**d**) that he did not learn of the doctrine of diminished capacity until approximately 2 ½ years before the collateral filing and, immediately after learning of the defense, he assiduously sought the assistance of new counsel in securing and reviewing the medical and psychiatric records relevant to the issue; and (**e**) that the necessary medical records were not obtained until early in the year of the collateral filing when the defendant was able to obtain the services of an attorney who filed for the relief. (*Id.* at 1040-1041.)

Petitioner argued that the circumstances in the case at hand were sufficiently similar to *Saunders* so as to warrant a substantial justification for any delay. To begin, here, Petitioner has a bare high school-level education which she obtained by attending the public schools within some of the poorest areas of Egypt. Moreover, the record from her trial clearly shows that she lacked a basic understanding as to what was occurring around her, as evidenced by her testimony. The reason for this lack of basic knowledge stems from Petitioner's lack of English language skills, different ethnic and cultural beliefs and customs, and most importantly, her "deep psychosis" which she suffered from at the time of her trial. (Exhibit C, [Declaration of Dr. Miles Estner].)

Additionally, Petitioner not only lacked experience or education in law, but she also lacked the mental capacity to reason or assist habeas counsel in her defense. (Exhibit C [Declaration of Dr. Miles Estner, page 2];(Exhibit A [Declaration of Roger T. Nuttall, pages 1-5].) At present, however, Petitioner through her efforts of self-education, psychiatric treatment, devoted prayer, and the love and support of her new husband, has improved her mental condition enough to assist in her defense. This has only occurred since late 1997. (Exhibit C [Declaration of Dr. Miles Estner], and Exhibit A [Declaration of Roger T. Nuttall].) Since that period, habeas counsel had diligently and assiduously persisted in efforts to research the issues that have been brought up by Petitioner as she has been able to contribute.

Additionally, Petitioner had no reasonable knowledge of the unconsciousness defense which was unilaterally abandoned by defense counsel at trial. The defense was not discussed with her nor even asserted on appeal. Once this defense was discovered by

habeas counsel, habeas counsel assiduously pursued the defense by diligently securing and reviewing the pertinent medical and psychiatric records.

Further, similar to the *Saunders* case, the essential medical records pertaining to Petitioner's condition as relative to the unconsciousness defense, were only fully obtained in late August of 1998. (Exhibit C [Declaration of Dr. Miles Estner, page 3].) Hence, this 13-month period between when the essential medical records were obtained and when this petition was filed compares favorably with the period in *Saunders*.

Also, as in the *Saunders* case, Petitioner's medical file, because it contained only information from Dr. Boyd, Dr. Sheffner, and the prison doctors' findings regarding her mental condition, was incomplete and has only recently been completed by Dr. Estner's submission of his findings on October 5, 1998.

Thus, Petitioner argued that under *Saunders* there was substantial justification for any delay in this petition.

In contrast to *Saunders*, the California Supreme Court, in *People v. Jackson, supra*, 10 Cal. 3d 265, denied a petition as untimely where the defendant contended that he had been denied effective assistance of counsel at the guilt phase of his trial as a result of his attorney's failure to raise the defense of diminished capacity. There, (**a**) Jackson delayed 11 years before making his attack on that judgment and presented no justification for the delay; (**b**) the evidence on which he relied for collateral relief was largely a repetition of that presented in an early trial; and (**c**) defendant had not raised the issue in 3 prior appearances before the Court.

It is notable that during the pendency of all state habeas proceedings, the People neither argued that the Petitioner's request

was time-barred, nor did any of the reviewing courts hold that the Petitioner's state collateral proceedings were time-barred.

In federal habeas proceedings, the Petitioner concedes that the AEDPA applies to her filing.

Petitioner contends that the provisions of 28 U.S.C. 2254(d)(2) are sufficient to toll the statute of limitations provisions of the AEDPA during the pendency of state collateral proceedings. The People argue that Green v. White, 223 F.3d 1283, 1288-1289 (9th Cir. 1997) applies herein; however, Green concerned itself with a Petitioner, who had a previous federal habeas petition dismissed for failure to exhaust state remedies; then delayed filing a second petition until more than one year after the exhaustion of state collateral proceedings. Such is not the case herein.

Further, it is clear that the doctrine of "equitable tolling applies herein. The Petitioner had experienced serious mental problems for many years. This is uncontraverted. She has been subject to ritual sexual mutilation, ongoing and continuing sexual abuse since childhood, slavery, forced drug use, and prostitution.

The Ninth Circuit has addressed equitable tolling of the AEDPA's statute of limitation in two opinions - Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1288-1289 (9th Cir. 1997); and Calderon v. United States (Kelly), 163 F.3d 531, 541, (9th Cir. 1998). In both cases the Court held that equitable tolling of the AEDPA's statute of limitations is permitted "if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time". Calderon (Kelly) at 541, citing Alvarex-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996); cert. Denied, 118 .S.Ct. 60 (1997).

In Calderon (Kelly), the Court found that the petitioner's mental

incompetency - ".....a condition that is, obviously, an extraordinary circumstance beyond the prisoner's control - rendered the petitioner unable to assist his attorney in the preparation of his petition, and therefore served to equitably toll the statute of limitations.....". The Court further found that when a putative habeas petitioner's mental incompetency is at issue, and the record discloses a genuine basis for concern, it was appropriate to toll the AEDPA's time bar.

It is clear from the medical records, and opinions of medical experts that the Petitioner was incompetent to assist in her own defense, assist counsel in the preparation of a writ of habeas corpus, much less understand and undertake the preparation for a Petition For A Writ Of Habeas Corpus until mid 1998 at the earliest. Thus, "equitable tolling" is appropriate until such time as the Petitioner became competent. And in fact, counsel believes that the Petitioner still exhibits periods and signs of mental incompetence. The Ninth Circuit Court of Appeals squarely addressed this issue recently in Crawford v. Oregon State Hospital, 36 Fed. Appx. 894; 2002 U.S. App. Lexis 5368 (9th Cir. 2002) holding that where a Petitioner made an adequate showing of mental incapacity, there is a duty by the district court to inquire as to whether such incapacity created grounds for equitable tolling. The Court stated the petitioner (Crawford) did not waive the issue by failing specifically to invoke the doctrine of equitable tolling in the district court, but that his response, and the record, disclosed a sufficient basis to question his mental state and required the district court to examine whether grounds existed for equitable tolling on that basis. In Crawford, the appellate court required that the district court inquire more fully into the petitioner's mental state before applying the time bar. See Crawford at 895.

Additionally, a Petitioner is entitled to statutory tolling for any

period of time during which a properly filed habeas petition is pending in state court. *28 U.S.C.S. § 2244(d)(2).*

Further, the Petitioner requests, as it did it its initial filing, that the Court take notice of Odle v. Woodford, 238 F.3d 1084 (9th cir. 2001); a case which has significantly parallels the circumstances in the instant matter. In Odle the appellate court held that the trial court's unreasonable failure to inquire whether the petitioner possessed the mental acuity to participate in the trial, violated the petitioner's right to due process. While Odele did not involve a AEDPA issue, it is clear from the record that this petitioner was mentally incompetent at the time of the trial; and that she remained so, at least through mid 1998; and in fact may very well still experience psychotic episodes.

CONCLUSION

The People's Motion To Dismiss, should be denied. The Petition was timely filed pursuant to 28 U.S.C. 2844 (d)(2). Further, if the Court should determine that the above is not correct; the Court should then permit equitable tolling of the AEDPA's statute of limitations. At a minimum, the district court should hold a hearing to determine if the Petitioner was mentally incompetent so as to justify equitable tolling.

This is a case which cries out for habeas relief in the interest of justice. A young girl, ritually mutilated, forced into sexual activities with family members, sold into slavery, forced into prostitution; abused at every turn; over whelming evidence of ineffective assistance of counsel; and documented evidence collusion between her trial counsel and the Court in her original conviction.

The Court is requested to order an evidentiary hearing as to this Petition.

DATED: April 18, 2003.

Respectfully Submitted,
NUTTALL BERMAN ATTORNEYS
"s/ROGER T. NUTTALL"
By: _____
ROGER T. NUTTALL
Attorneys for Petitioner
OMAIMA NELSON

EXHIBIT A

DECLARATION OF ROGER T. NUTTALL

STATE OF CALIFORNIA,)
COUNTY OF FRESNO.)ss.
I, ROGER T. NUTTALL, declare that:

1. I am an attorney licensed to practice law in the State of California, and that I am the attorney of record for the Petitioner, Omaima Nelson, herein;

2. I was retained to represent Omaima Nelson in September of 1995, after the Supreme Court of California denied a hearing in this case, to look at the case in terms of a remedy for Nelson's conviction. For the remainder of the year 1995, I, together with a member of our support staff, reviewed the transcripts of the trial, which were lengthy, as well as the appellate briefs relative to the appeal of this case;

3. Initially, we began researching the remedies of Coram Nobis and Habeas Corpus. We also began researching certain aspects of the law as related to problems particularly related to our client, e.g. sexual mutilation as it related to her having been sexually mutilated as a child in Egypt and her subsequent physical and sexual abuse at the hands of her late husband;

4. I completed several interviews with Omaima during the latter part of 1995. These interviews were highlighted by the client's disorganized mental state and the attendant difficulties of dealing with her on a personal level as well as trying to ascertain her recollections of the trial and the facts of the case. Also, the client

lacked any significant legal knowledge;

5. Throughout this time period, we were actively trying to obtain mental health records from Orange County, as well as hospital records dealing with Omaima Nelson's mental state;

6. The review of the documentation that we had thus far received continued into the early part of 1996, and it was at that time that we began legal research regarding the issues that had been raised on appeal. Meanwhile, we continued to talk to experts concerning the genital and sexual mutilation issues, as well as review the medical records which we had thus far obtained. We further examined the appellate issues through a review of the trial transcripts and continued to seek records from the Orange County Superior Court. We received additional records from the Orange County Superior Court in late February, 1996;

7. At that time, we began to examine pretrial matters such as pretrial motions and matters attendant to that. We initially focused on the idea of re-litigating all the issues related to the possible plea of not guilty by reason of insanity, which we felt should have been assert d in this case. We further examined an insanity plea in relation to a Petition for a Writ of Habeas Corpus. All the while, we continued to visit periodically with the client to see if her mental state had improved enough to a point where she could be able to relate to us her recollection of the circumstances of the case and/or her recollection of the trial.

8. While I felt that she was getting better during early 1996, there were certain difficulties still present that we were simply unable to be overcome in terms of being able to communicate with her;

9. By the Summer of 1996, we had discerned what issues

needed to be developed; namely, the insanity issue, the delay of the jury deliberations, as well as the competency of counsel issues. Pursuant to this end, we telephoned Mr. Thomas Mooney at the public defender's office in Orange County to obtain his file. We were, at that time, particularly interested in what type of medical and psychiatric records Mr. Mooney had;

10. In October of 1996, I traveled to Orange County to meet with Mr. Mooney and to consult with him, as well as with Dr. Nancy Kaser-Boyd in order to ascertain her thoughts on the mental issues involved in this case. I also met with Dr. Teresa Farjalla who had been a treating doctor while Omaima Nelson was in custody, awaiting and during trial;

11. During my meeting with Mr. Mooney, I requested that he immediately forward the psychiatric and medical records. He represented that he would send me all pertinent records regarding Omaima Nelson's case such that I relied on his assurances;

12. In a subsequent meeting with Omaima Nelson, I was able to gather enough information which allowed me to contrast what she was able to remember, and not remember, with the trial transcript. This, coupled with my discussions with Dr. Kaser-Boyd, convinced me that the most significant issue in the case was the failure to assert the insanity defense. At that time, I questioned (in my own mind) whether an unconsciousness instruction had been given, but I did not delve into that further at that time;

13. In October, 1996, we wrote again to Mooney requesting the client's medical and psychiatric records, as well as support for any waiver of the insanity defense. We also began to re-examine the transcript in light of the issues that we had developed at that time. Additionally, we began speaking with the appellate attorney

concerning certain appellate materials, and inquiring as to what other issues he thought may be available;

14. In December of 1996, we again wrote to Mr. Mooney specifically reminding him, for the second time, in as many letters, that we needed Omaima Nelson's medical, psychological and psychiatric reports, together with any records of her waiver of the insanity defense;

15. In approximately late 1996, Omaima Nelson began to become somewhat more lucid; and during my meetings with her, we were able to talk somewhat more about her recollection of whether or not she waived the insanity defense and what she remembered of the circumstances of that waiver;

16. It became clearer and clearer to me that Omaima Nelson was, during the trial of her case, effectively "excluded" from what was transpiring in the most important matters of the trial, and that matters were being handled on her behalf, without her approval and in her absence, or both;

17. During the early part of 1997, we continued to work on the preparation of the petition for Writ of Habeas Corpus, but by May of 1997, we still had not received the medical, psychological, or psychiatric records and reports which we had requested, nor had we received information relative to the purported waiver of the insanity defense;

18. In July of 1997, we did finally receive those materials, and we commenced conducting a review of those records;

19. Following a review of those materials, we discovered that there were additional failures on the part of counsel to pursue two very important issues; namely, the issues of unconsciousness and incompetency to stand trial. Through further review, we also

discovered that the unconsciousness jury instruction had apparently been withdrawn by counsel during the trial. We then began researching the law regarding unconsciousness and came t:o believe that it was a very appropriate issue based upon the facts of the trial as derived from the trial transcripts. Also, in approximately September, 1997, based upon what I was learning from the client from my discussions with her, (she was continuing to become much more lucid), we began considering the fact that Omaima Nelson had most, likely been incompetent to stand trial at the time of trial and had really not known what was occurring at that time;

20. Subsequently, I again flew to Los Angeles and met with Dr. Nancy Kaser-Boyd wherein I discussed with her both the insanity and unconsciousness defenses. She affirmed to me that indeed both were, in her opinion, viable defenses;

21. In October of 1997, we sent Dr. Kaser-Boyd relevant reports and again pursued the purported waiver of the insanity defense by writing a fifth letter to Mr. Mooney requesting the waiver, as well as any other materials that he had concerning evaluations of Omaima Nelson by Dr. Nancy Kaser-Boyd from the time of the trial;

22. Thereafter, we received what may have been the purported waiver of Omaima Nelson's insanity defense, which was, in fact, merely a waiver of her right to be present;

23. At that same time, we came to the realization that the truly most significant issue in the case was the issue of unconsciousness, in addition to the insanity issue, and we began doing significant work on the unconsciousness issue. Towards this end, in early 1998, we were able to retain Dr. Miles Estner, a

medical doctor and a psychiatrist, to review the entire case including all of the records in order to advise us on the viability of the unconsciousness and insanity defenses;

24. Continuing in 1998, Dr. Estner proceeded to review all of the records that we had thus far acquired. He felt that he needed to see Omaima Nelson's prison medical file, as well as, visit her in prison. After having some difficulty in arranging meetings with her, Dr. Estner ultimately came to the conclusion, during the mid part of the year 1998 that, more important than the failure to assert the insanity defense, was the failure to assert the unconsciousness defense because it was particularly viable. Dr. Estner also concluded that, perhaps equally as important as the unconsciousness defense, was the failure to request, on the part of counsel, and the failure to conduct, on the part of the court, a Penal Code Section 1368 competency hearing. In Dr. Estner's opinion, Omaima Nelson was, at the time of the trial, both mentally and physically incompetent to stand trial;

25. Since the latter part of 1998, our office has been trying to perfect our entire Petition for Writ of Habeas Corpus. This process has included a review of the entire case file and a thorough examination of all possible relevant legal issues in order that the Petition be ultimately complete and adequate. In this regard, we have explored additional issues, including, but not limited to, cultural defenses, the possible error with reference to not providing Omaima Nelson with a court certified interpreter, but these, among other issues, have been discarded;

26. In general, this project has been a mammoth undertaking and has been a project wherein a tremendous amount of time and resources have been devoted in order that justice may ultimately

be served in this case. Notwithstanding other significant commitments on the part of our small office to matters of significant and complex litigation, we have pursued our investigation and preparation of the instant Petition with as much reasonable diligence as could be done within the normal constraints of a practicing law office. Because of the enormity of what was required by this project, there were times when we could not match the resources that seemed to be required. However, we have, through continuous, diligent, and even tenacious efforts, been able to finish this Petition and bring to light certain errors and injustices which have unfortunately been allowed to stand;

27. It should be emphasized that since middle to late 1998, following our conclusion, based upon our review of the complete file, as well as our review of Dr. Estner's analysis of the complete file, that the most viable aspects of the case deal with Omaima Nelson's unconsciousness defense, as well as her incompetency to stand trial, and we have since directed our efforts assiduously toward those issues;

28. Attached hereto as Exhibit "B" and incorporated herein by reference, is a true and correct copy of the Declaration of Omaima Nelson;

29. Attached hereto as Exhibit "C" and incorporated herein by reference, is a true and correct copy of the Declaration of Dr. Miles Estner;

30. Attached hereto as Exhibit "D" and incorporated herein by reference, is a true and correct copy of the Declaration of Dr. Nancy Kaser-Boyd;

31. Attached hereto as Exhibit "E" and incorporated herein by

reference, is a true and correct copy of each cited portion of the Clerk's Transcript, in the order in which each is cited to in this Petition for Writ of Habeas Corpus;

33. Attached hereto as Exhibit "F" and incorporated herein by reference, is a true and correct copy of each cited portion of the Reporter's Transcript, in the order in which each is cited to in this Petition for Writ of Habeas Corpus;

34. Attached hereto as Exhibit "G" and incorporated herein by reference, is a true and correct copy of the Reporter's Sealed Transcript of the December 17, 1992 In Camera Proceeding, cited to several times in this Petition for Writ of Habeas Corpus;

35. Attached hereto as Exhibit "H" and incorporated herein by reference, is a true and correct copy the cited portion of the Reporter's Transcript Jury Voir Dire, cited to several times in this Petition for Writ of Habeas Corpus;

36. Attached hereto as Exhibit "I" and incorporated herein by reference, is a true and correct copy of records from the Superior Court of California, County of San Bernadino, cited to in this Petition for Writ of Habeas Corpus;

37. Attached hereto as Exhibit "J" and incorporated herein by reference, is a true and correct copy of each cited portion of the Appellant's Opening Brief On Appeal, in the order in which each is cited to in this petition for Writ of Habeas Corpus;

38. Attached hereto as Exhibit "K" and incorporated herein by reference, is a true and correct copy of Appellant's Petition For Review to the California Supreme Court and the Order of the California Supreme Court, cited to in this petition for Writ of Habeas Corpus;

39. Attached hereto as Exhibit "L" and incorporated herein by

reference, is a true and correct copy of a Memorandum, dated October 23, 1996, which I personally dictated to the case file, and which is cited to in this Petition for Writ of Habeas Corpus;

40. Attached hereto as Exhibit "M" and incorporated herein by reference, is a true and correct copy of a Memorandum, dated October 29, 1996, which I personally dictated to my secretary Rose, and which is cited to in this Petition for Writ of Habeas Corpus;

41. Attached hereto as Exhibit "N" and incorporated herein by reference, is a true and correct copy of a letter written by my law clerk Steven Bolm to Public Defender Tom Mooney, dated October 29, 1996 and which is cited to in this petition for Writ of Habeas Corpus;

42. Attached hereto as Exhibit "0" and incorporated herein by reference, is a true and correct copy of a letter written by my law clerk, Steven Bolm, to Public Defender Tom Mooney, dated December 26, 1996 and which is cited to in this Petition for Writ of Habeas Corpus;

43. Attached hereto as Exhibit "P" and incorporated herein by reference, is a true and correct copy of a letter written by me to Public Defender Tom Mooney, dated May 29, 1997 and which is cited to in this Petition for Writ of Habeas Corpus;

44. Attached hereto as Exhibit "R" and incorporated herein by reference, is a true and correct copy of Documentation regarding Dr. Miles Estner's visitation with Petitioner, referenced to in this petition for Writ of Habeas Corpus;

45. Attached hereto as Exhibit "S": and incorporated hereinby reference, is a true and correct copy of the Appellate Court Opinion, cited in this Petition for Writ of Habeas Corpus;

46. Attached hereto as Exhibit "T" and incorporated herein by reference, is a true and correct copy of a letter written by my law clerk, Steven Bolm, to Public Defender Tom Mooney, dated August 22, 1997 and which is cited to in this petition for Writ of Habeas Corpus;

47. Attached hereto as Exhibit "U" and incorporated herein by reference, is a true and correct copy of a letter written by my law clerk, Steven Bolm, to Public Defender Tom Mooney, dated October 28, 1997 and which is cited to in this Petition for Writ of Habeas Corpus;

48. Attached hereto as Exhibit "V" and incorporated herein by reference, is a true and correct copy if the Waiver of Defendant's Personal Presence, signed by petitioner and dated December 17, 1992, and which is cited to in this petition for Writ of Habeas Corpus;

I declare, under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct, except as to those matters stated on information and belief, which we believe to be true, and that this Declaration was executed on September 21,1999, at Fresno, California.

"S/ROGER T NUTTALL"
ROGER T NUTTALL

EXHIBIT B

DECLARATION OF OMAIMA NELSON

STATE OF CALIFORNIA,)
COUNTY OF MADERA.) ss.

I, OMAIMA NELSON, declare that:

1. I was the defendant in a criminal trial in the Orange County Superior Court wherein I was convicted of Second Degree Murder in 1993;

2. Basically, I still do not feel that I understand what actually happened in terms of the facts of the case giving rise to the prosecution;

3. I still do not feel that I really understood what was going on in terms of the trial itself;

4. I now believe that I suffered from a mental illness at the time of the events concerning the facts of the case and at the time of the trial, but at that time, I did not know whether the issue of my mental illness had been addressed by the court or by my lawyer, Mr. Mooney;

5. At some point, my attorney, Mr. Mooney, discussed with me my "sanity" and said something to me about my being insane after the killing, but not at the time of the killing;

6. I did not know at the time of the trial anything about my attorney asserting an "unconsciousness" defense, nor did I know that there was available to me a defense based upon unconsciousness;

7. I did not know that Dr. Nancy Kaser-Boyd recommended or wanted my attorney to assert the "unconsciousness" defense;

8. My attorney, Mr. Mooney, never discussed the "unconsciousness" defense with me;

9. I did not know that my attorney had originally submitted a jury instruction based upon "unconsciousness" and that he, thereafter, withdrew said proposed jury instruction;

10. As I best recall, the first time that I was aware of the possibility of a defense based upon "unconsciousness" was when I spoke with Attorney ROGER NUTTALL, about the question of unconsciousness during the latter part of the year 1997, or early part of the year 1998;

11. My attorney, Mr. Mooney, exercised his control only over the decision to assert a defense based upon insanity;

12. I did not know about the "in chambers" meeting respecting the assertion of not guilty by reason of insanity plea; I did not waive my right to be present (in said "in chambers" meeting;

13. The only thing that I remember concerning the assertion of the not guilty by reason of insanity plea was that I was told by my attorney that if the jury found that I was insane, I would spend the rest of my life in confinement in a mental institution;

14. My attorney, Mr. Mooney, exercised his control only, over the decision to allow a delay following closing arguments at the Superior court trial before jury instructions were given. To my knowledge, he did not object. I have questioned him as to why there would be such a delay, and he stated that the decision had already been made.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this

Declaration was executed on May 2, 1999, at Chowchilla, California.

Signed: "s/Omaima Nelson"
Omaima Nelson

EXHIBIT C
DECLARATION OF DR. MILES ESTNER

(see H4 - not reprinted here)

EXHIBIT D

DECLARATION OF NANCY KASER-BOYD, Ph.D.

STATE OF CALIFORNIA,)
COUNTY OF FRESNO.) ss.

I, NANCY KASER-BOYD, declare that:

1. I am a clinical and forensic psychologist properly practicing in the State of California

2. I examined Omaima Nelson seven times, over 25 hours while she was in jail awaiting trial. I also reviewed all of the evaluation materials following Omaima's trial for the purposes of developing and publishing a law review article on the legal relevance of Post-Traumatic Stress Disorders;

3. In my opinion, based upon a thorough psychological examination of Omaima, Omaima was deeply psychotic, not only at the time of the incident, but most likely for at least several weeks following the incident. Her formal diagnosis was Post-Traumatic Stress Disorder Complex, and I believe that she was in a Reactive Dissociative State at the time of the homicide and dismemberment of the body of her husband;

4. I believe that the Reactive Dissociative State was triggered by a 'threatening' situation which included substantial verbal abuse, threats to harm her, cuts inflicted on her body, and intense vaginal pain caused by the effect of forced sexual assault on her already fragile circumcized genital area.

5. The bulk of my work with Mr. Mooney went toward developing the unconsciousness defense, however, my diagnosis

of Omaima also supports the insanity defense and imperfect self-defense.

6. It was never my opinion that the defense of not guilty by reason of insanity was inappropriate or inapplicable in this case. I never advised Mr. Mooney that he should not use this defense. It is my memory that he was concerned that the outcome of the insanity defense is often. lifelong placement in a psychiatric facility.

7. Likewise, it was never my opinion that the defense of unconsciousness was inappropriate or inapplicable in this case. I never advised Mr. Mooney that he should not use this defense. My recollection is that a substantial part of my trial testimony explained dissociation and how this makes a person psychologically "unconscious".

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct and that this Declaration was executed on August 13, 1999, at Studio City, California.

Signed, "s/Nancy Kaser-Boyd, Ph.D."
Nancy Kaser-Boyd, Ph.D.